No. 13047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, and THOMAS B. MACK,

Appellees.

OPENING BRIEF OF APPELLANT VIVIAN WINGET.

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OPENING BRIEF OF APPELLANT VIVIAN WINGET.

Designation of Parties.

For the purposes of clarity, appellant and cross-appellee Standard Accident Insurance Company of Detroit, Michigan, will be hereinafter designated as "Standard" or "Defendant Standard." Appellee and cross-appellant Vivian Winget, formerly Vivian Delozier, will be hereinafter

designated as "Winget" or "Plaintiff Winget." Appellee Thomas B. Mack, who is making no appearance on this appeal, will be hereinafter designated as "Mack" or "Defendant Mack." Assured under the policy of insurance involved in the case, Billy Ray Towry, will be hereinafter designated as "Towry."

Statement of Pleadings and Facts.

As will appear from the complaint on file in this case [Tr. pp. 6 to 13], plaintiff Winget on the 31st day of March, 1951, recovered a judgment in the Superior Court of the State of California, in and for the County of Ventura against Towry for the sum of $32,000.00 with interest thereon at 7% per annum from the 30th day of March, 1950, together with costs of suit in the sum of $97.80 [Tr. p. 34]. The action in state court was prosecuted upon a complaint which alleged, generally, that the plaintiff was riding as a guest in the vehicle of Towry and that, in the first cause of action, said Towry was guilty of wilful misconduct in the driving of his vehicle, and, in the second cause of action Towry was driving while under the influence of intoxicating liquor and in the third cause of action that Towry was guilty of both wilful misconduct and driving while under the influence of intoxicating liquor. In the course of the trial of the case in state court, the plaintiff Winget moved to dismiss the second and third causes over the protests of insurance counsel for Towry against said dismissal but the Court denied plaintiff's motion to dismiss the same [Winget's Ex. 5 for identification].

As will further appear from the complaint on file in this case [Tr. pp. 6 to 13], in the same automobile accident, defendant Mack was injured as a guest and he filed a complaint for damages in the Superior Court of Ventura County also, and his case and the case of the plaintiff Winget were consolidated for trial. He alleged wilful misconduct of Towry as his only cause of action. [Tr. p. 46.] At the same time that plaintiff Winget recovered judgment for $32,000.00 as above set forth, defendant Mack recovered a judgment for $15,000.00 with interest and costs. The two judgments total $47,000.00 of which Winget's judgment is 68.0851% and Mack's is 31.9149%.

At the time of the aforementioned accident, said Towry had a policy of public liability insurance in force with defendant Standard with limits of liability of $10,000.00 for each person and $20,000.00 for each accident. [The policy is Winget's Ex. 4.]

The complaint in this case was originally filed in State Court and that Court, in response to the prayer of the complaint, issued its restraining order and subsequently, an injunction, pending the final determination of the cause, restraining and enjoining Standard from in any manner paying to or settling with defendant Mack for any sum or sums due or owing or alleged to be due or owing under the terms of the liability policy above mentioned. Winget alleges in her complaint that, by reason of the greater size of her judgment over that of Mack's she is entitled to 68.0851% of the total limit of Standard's liability

under the policy in the sum of $20,000.00, and that defendant Mack is entitled only to the remaining 31.9149% of said sum. Winget further alleges in her complaint that any payment by Standard to Mack under the terms of the policy would result in a satisfaction of $10,000.00 worth of liability under the policy so that Winget would then be entitled only to the remaining $10,000.00 under the policy. For these reasons, Winget sought to prevent Standard from settling with Mack pending a final determination of whether Wnget was entitled to such pro-rata share of the $20,000.00.

Defendant Standard, a citizen of Detroit, Michigan, petitioned the District Court for removal of the cause from State Court to the District Court [Tr. pp. 3 to 14], citing the provisions of *Sections* 1332 *and* 1441, *Sub-division* (*c*) *Title* 28 *of the United States Code. Section* 1441 (*c*) *Title* 28 *U. S. C.* is to the effect that if a separate and independent claim or cause of action which would be removable if sued upon alone, is joined with one or more otherwise non-removable, the entire case may be removed, or in the District Court's discretion, it may remand all matters not otherwise within its original jurisdiction. Defendant Standard claimed that defendant Mack, a citizen of California, and plaintiff Winget, also a citizen of California, are regarded as being on the same side of the dispute and against the non-resident defendant Standard and therefore the non-resident defendant was entitled to remove the cause from State to Federal Court, citing *Carson v. Hyatt*, 118 U. S. 279. The case

was consequently removed from State Court to Federal Court.

Defendant Standard denied liability under the terms of the policy alleging that Towry failed, neglected and refused to cooperate with Standard in accordance with the provision in the policy to the effect that Towry would cooperate with Standard and assist Standard in securing and giving evidence. The lack of cooperation consisted, as alleged, in Towry giving false statement to defendant Standard concerning the facts of the accident prior to the trial of the actions in State Court [Tr. pp. 14 to 17], in particular, concerning whether he drank intoxicating liquor on the day of the accident.

Defendant Mack answered and asked, as did plaintiff Winget, that the sum of $20,000.00 due under the policy be paid into Court, but that, instead of pro-rata distribution of said fund, that Mack receive $10,000.00 thereof. Otherwise, defendant Mack's answer was substantially in line with Winget's complaint. [Tr. pp. 18 to 21.]

Trial of this action commenced in District Court before a jury on March 27, 1951. In the course of the trial, defendant Mack and defendant Standard stipulated for a settlement of Mack's case for the sum of $6,000.00 and it was moved that the District Court make its order authorizing defendant Standard to conclude such settlement and that the Court rule plaintiff Winget was limited to a recovery under the policy in the principal sum of $10,000.00. [Tr. pp. 68 and 69.] The District Court, over

the strenuous objections of plaintiff Winget, granted the motion, vacated the restraining order and injunction theretofore made by the State Court [Tr. p. 79] and denied plaintiff Winget's application for a restraining order on Federal Court against such settlement. Defendant Mack was thereupon permitted to withdraw from further participation in the trial.

In the course of the trial the District Court granted the motion of plaintiff Winget to amend her complaint by inserting therein a prayer for interest at 7% per annum from the 30th day of March, 1950 on the total sum of $32,000.00, the principal sum of the judgment obtained by Winget against Towry. [Tr. p. 32.]

The single issue as to whether Towry had cooperated with his insurance company or not was submitted to the jury [Tr. pp. 29, 31 and 234] and the jury returned a verdict in favor of plaintiff Winget on that issue. [Tr. p. 28.] Upon the issues of pro-rata distribution of the $20,000.00 fund and interest on the entire $32,000.00 judgment in favor of Winget, which issues were not submitted to the jury, findings of fact and conclusions of law were made and filed and judgment was made and entered thereon in favor of the plaintiff Winget for $10,097.80 together with interest thereon at the rate of 7% per annum from the 30th of March, 1950 plus costs. [Tr. pp. 28 to 36.] The findings and conclusions denied Winget's contention for pro-ration and interest on $32,000.00.

Statement of the Case.

Defendant Standard appealed to this Circuit Court contending that Towry was guilty of making a wilful misrepresentation of facts relating to the accident in the case which constituted a breach of the obligation of Towry to cooperate with the insurance company as a matter of law. This issue was raised by defendant Standard as an affirmative defense in its answer in the case.

Plaintiff Winget likewise appeals to this Circuit Court contending that, although the trial court correctly found there was no wilful misrepresentation of facts by Towry, the trial court nevertheless erred in failing to require Standard to pay into Court the $20,000.00 and to award to Winget a pro-rata share of that sum due and payable under the policy, and also that the Court erred in failing to award Winget interest at 7% per annum from the 30th day of March, 1950 on the total judgment in State Court in her favor in the sum of $32,097.80. Plaintiff Winget also contends that if it be determined that such error prejudiced Winget, then the trial court erred in failing to restrain defendant Standard from settling with or in any manner paying to or compromising with defendant Mack and in accepting and approving a judgment by stipulation for $6,000.00 in favor of Mack and against Standard. [Tr. pp. 268 and 270.]

The issue of pro-rata share was raised by plaintiff Winget in her complaint, the issue as to interest was raised by motion to amend the complaint granted in the course of the trial and the issue regarding approving of

a settlement by stipulation for $6,000.00 in favor of Mack was raised in the course of the trial at the time defendants Standard and Mack applied to the Court for such approval.

Defendant Mack has not filed an appeal herein but was dismissed from the action on July 9, 1951 (after this appeal was started), without prejudice to Winget's claims regarding pro-ration and interest.

Specification of Errors.

Plaintiff Winget contends that the trial court erred in the following respects:

1. In concluding [Tr. p. 34] that plaintiff Winget is not entitled to a pro-rata share of the total sum of $20,000.00 payable under the policy.

2. In concluding [Tr. p. 34] that plaintiff Winget is not entitled to interest on the total sum of $32,097.80, the amount of her judgment against Towry in State Court.

3. If it be determined that such error prejudiced plaintiff Winget, the trial court erred in approving a stipulation for settlement for $6,000.00 in favor of Mack and against Standard over objection by Winget. [Tr. p. 29.]

ARGUMENT.

This argument will be divided into the two main questions for determination by the Appellate Court on Winget's appeal, first, the trial court should have required the insurance company to pay $20,000.00 into Court and awarded from such sum $13,617.02 to the plaintiff Winget (subdivided into "Winget's Theory" and "Authorities supporting Theory") and secondly, the trial court should have required the insurance company to pay interest to Winget at 7% per annum on the full sum of $32,097.80 from the 30th day of March, 1950.

The Court Should Have Awarded Pro-Rata Winget's Theory.

As indicated above the policy of insurance in this case is what is commonly known as a 10-20 policy. Paragraph I of the insuring agreements, page 2 of the policy reads as follows:

> "Coverage A—Bodily Injury Liability—To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Paragraph 1 of the conditions on page 3 of the policy reads as follows:

> "Limits of Liability—Coverage A—The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the com-

> pany's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

It is to be noted that the last paragraph above quoted contains two clauses divided by a semicolon, the first referring to "each person" and the second referring to "each accident". For the purposes of clarity, I shall refer to these two clauses hereinafter by the "each person clause" and the "each accident clause."

It is plaintiff Winget's contention that when she and Mack, both guests in the vehicle involved, obtained judgments in State Court against Towry totaling $47,000.00, and those judgments became final, the liability of defendant Standard was then fixed under the terms of its policy at a total of $20,000.00 plus interest and costs. *From that time on it was of no concern whatsoever to the insurance company as to how the $20,000.00 was split between the two parties suffering injuries in the one accident, the only concern of the insurance company being whether it was relieved of liability once it had paid the $20,000.00, plus interest and costs, as it was required to do under its policy.* Plaintiff Winget does not contend that the insurance company is liable to her as an individual

and as a single person suffering injuries in the accident in excess of $10,000.00 plus interest and costs but she does contend that the insurance company is liable to pay a total of $20,000.00 plus interest and costs toward the satisfaction of judgments obtained against the assured for bodily injuries arising out of the one accident in accordance with the provisions of paragraph I of the insuring agreements of the policy. *It is extremely important at the outset that the Appellate Court divorce the idea that the insurance company has any say in the distribution of the money from the insurance contract altogether.*

The insurance company has in the trial court and will, undoubtedly, on this appeal, insist that the "each person" clause of paragraph 1 of the conditions fixes its liability *to plaintiff Winget* at the principal sum of $10,000.00. However, the liability to Winget as an individual under the policy is not applying the true facts of paragraph 1 of the conditions to that paragraph. The true facts are that there was an injury to two persons and we would therefore of necessity have to invoke the "each accident" clause of paragraph 1 which definitely fixes the liability of the company at $20,000.00 for the one accident. The contract therefore has fixed the liability of the company at $20,000.00 and from there on the insurance company has no interest in how that fund is divided except to see that its liability under the policy is satisfied. Under paragraph 1 of the conditions, the insurance company is not liable to *the person* for $10,000.00 but is liable to *all persons* for $20,000.00 for the single accident. The $20,000.00 is a fund out of which the assured is entitled to have his obligations on judgments partially satisfied. How that fund is to be divided is a matter of equity, as herein-

after set forth, and is of no concern to the insurance company.

Let us assume that plaintiff Winget's judgment in this case were $12,000.00 and defendant Mack's were $6,000.00. In such case, the total liability of the company would be to Winget as an individual $10,000.00 and to Mack as an individual $6,000.00, making a total liability of the company for the single accident of $16,000.00. That is the only effect of the phrase in the "each accident clause" reading "subject to the above provision respecting each person." On payment of that $16,000.00 the company would obviously be relieved from liability under the policy although the distribution of that $16,000.00 under equitable principles as hereinafter set forth, would be on a pro-rata basis between the two judgment creditors.

To put it another way, the claim that the two plaintiffs in the State actions have two separate funds out of which to receive their claims is inaccurate when we consider the language of the policy that $20,000.00 shall be paid for one accident. As between each of the claimants individually and the insurance company there is a limit of liability on the part of the insurance company of $10,000.00. However, as between the two creditors together and the insurance company, the limit of liability on the part of the insurance company is $20,000.00 and they are entitled to a pro-rata share of that fund. The full $20,000.00 should be paid into the Court and the Court award the pro-rata share.

Let us assume that three persons were injured in this accident instead of two and each of the three recovered judgments exceeding $10,000.00 but otherwise the judgments were different in amounts. Obviously, under such

a situation, the Court under the equitable principles hereinafter set forth would be required to divide the $20,000.00 pro-rata among the judgment claimants. *Is there any reason why the rule should be different as to two than it would be for three?*

Let us assume that instead of Towry having the insurance policy he had $20,000.00 in the bank and the plaintiff Winget and defendant Mack, both having obtained their judgments at the same time, levied execution, also at the same time, upon that fund. That $20,000.00 would be then within the jurisdiction of the Court the same as the liability of the insurance company in this case is within the jurisdiction of the Court. Surely it could not be contended that $20,000.00 in cash belonging to Towry should be distributed in any other way than pro-rata.

Under the terms of paragraph I of the insuring agreements, the insurance company agrees to pay all sums that Towry "shall become obligated to pay by reason of the liability imposed upon him by law for damages." Towry became obligated to pay $47,000.00. The limit of the policy being $20,000.00, that amount should be paid in Court for distribution pro-rata by the Court in partial satisfaction of Towry's $47,000.00 obligation. Towry is entitled to have $20,000.00 applied by the insurance company on his obligations and Winget and Mack are both subrogated to Towry's rights in this respect.

Another way of looking at it would be that if Towry had paid $13,000.00 to plaintiff Winget and $6,400.00 to defendant Mack, he could have forced the insurance company to reimburse him for the $20,000.00 limit for the one accident. How Towry applied the money on the judgments would be no affair of the insurance company.

It is quite obvious that the only intent of paragraph 1 of the conditions in the policy above quoted, is to determine the maximum limit of the company's liability. *Surely it could not be contended that the insurance company was attempting to contract for and determine the rights of third parties, giving one a preference over the other, when it made its contract of insurance.* Winget, a third party bringing this action, is not suing on the insurance contract but is suing for the liability created and fixed by that contract and definitely in existence in the sum of $20,000.00.

It seems clear that if the insurance company had settled with Mack for $8,000.00 and obtained a satisfaction from him, that would release the insurance company from $10,000.00 worth of liability under its policy. However, plaintiff Winget contending that she has a pro-rata interest in the entire fund of $20,000.00, sought to diligently restrain and enjoin the insurance company from making any such settlement to her irreparable damage. The moment that she obtained her judgment in State Court she had a property interest in the nature of a lien upon that fund which entitled her to injunctive relief to prevent settlement of claims of others whose claims had likewise been determined. If hers was the only judgment, then of course the fund would amount to only $10,000.00. But the fnud was established at $20,000.00 when the liability of the company was established at that figure by the $47,000.00 in judgments. By her diligence she was thus able to bring within the jurisdiction of the Court the liability under the policy so as to avoid a preference in favor of Mack and arrive at a fair and equitable pro-rata distribution of the funds. The fact that the District Court vacated the restraining order of the State

Court and denied Winget's request for a Federal Court injunction [Tr. p. 79] should make no difference. Obviously it was done over the strenuous objections of plaintiff Winget and, on this appeal, must be considered as without prejudice to said plaintiff. Especially is this true when we consider that the insurance company is not prejudiced inasmuch as the agreed settlement with Mack was some $300.00 less than what plaintiff Winget admits is owing to Mack. I am sure, also, that counsel would not deny that defendant Mack was dismissed from the action without prejudice to plaintiff Winget's claim in this respect on July 9, 1951, long after this appeal was set in motion.

Perhaps counsel for Standard will urge that if Mack had remained in the case the jury might have found against him on the issue of cooperation and therefore the only fund available to plaintiff Winget would be the $10,000.00. Clearly this would be without merit as the issue was exactly the same in Mack's case against the insurance company as it was in Winget's, that is, did or did not Towry cooperate with the insurance company? The facts presented to the jury applied with equal force to both cases. Such claim by Standard would be especially without merit in view of the fact that in Mack's case in State Court there was no issue tendered in the case of *Mack v. Towry,* as to the question of intoxication [Tr. p. 46], the failure of Towry to tell the insurance company about having drunk some beer being the lack of cooperation the company claims. On the other hand, in plaintiff Winget's case in State Court against Towry, the issue of intoxication was tendered although an attempt to dismiss it from the case was made during the course of that trial. [Winget's Ex. for identification No. 5.]

It should also be noted that the defendant Mack and the plaintiff Winget asked exactly the same relief of the insurance company in their prayers, namely, that the $20,000.00 be paid into Court. The issues to determine the granting of both prayers must necessarily be the same.

Thus, it is quite obvious that the jury having determined that Towry cooperated with the company in so far as Winget is concerned, it is conclusive upon the defendant Standard that Towry also cooperated with the insurance company in so far as Mack was concerned. It is therefore definite that a total fund of $20,000.00 is available for payment on the $47,000.00 worth of liability.

Authorities Supporting Theory.

The authorities hereinafter set forth fully sustains the plaintiff Winget's arguments above. They shall be divided into the following subdivisions: 1. Measure of liability. 2. Injunctive relief. 3. Payment relieves company of liability and 4. Equitable principles of pro-ration.

1. *Measure of Liability.* The case of *Hobson v. Mutual Benefit H. & A. Assn.,* 99 Cal. App. 2d 330 (1950), affirms the well recognized rule that in construing an insurance policy it must be borne in mind that where two constructions are reasonable, that which is more favorable to the insured should be adopted. Also, that the policy should be read as a layman would read it and not as an attorney or an insurance expert might read it. Applying the rule of this case to the two paragraphs of the policy above quoted, the interpretation would be that a fund of $20,000.00 is available to satisfy in part the obligations of the assured Towry. Any layman reading the first paragraph of the conditions would certainly gain the

impression that there was $20,000.00 available to satisfy any obligations arising from any one accident where two or more persons were injured.

A little more puzzling situation would seem to arise in the interpretation of these clauses of the policy in the case where we assumed that Winget had obtained a judgment for $12,000.00 and Mack a judgment for $6,000.00. In such case the measure of liability of the insured's company is $10,000.00 plus the amount of injury to the second person, $6,000.00, making a total of $16,000.00. See *7 Couch Cyclopedia of Insurance Law, page 6232.*

Thus, in *Mannheimer Bros. v. Kansas Casualty Surety Co.* (Minn. 1921), 184 N. W. 189, the assured used his insurance company to recover on a 5-10 policy where he had paid one judgment against him for $2,630.00 and one for $12,633.00. The insurance company paid $2,630.00 to him and he contended that the excess over $2,630.00 up to $5,000.00 should be applied on the larger judgment making a total of $7,630.00 to be applied on that judgment. The Court held he was entitled only to the $5,000.00 to be applied on the larger judgment plus, of course, the $2,630.00 which satisfied the smaller judgment. The total limit of the company's liability was therefore held to be satisfied for $7,630.00 paid on the two judgments, plus interest, costs and attorney's fees.

Most of the reported cases dealing with an interpretation of like clauses in other policies have to do with consequential injuries suffered by husband or father for his loss because of his wife's or children's injuries suffered in an accident. This involves an interpretation of the "one person" clause of the policy. For instance, in *Perkins v. Fireman's Fund Ind. Co.,* 44 Cal. App. 2d 427, the wife was injured in an accident and obtained a $30,-

000.00 judgment. (A second person was injured in the same accident and obtained a $4,750.00 compromise. A 10-20 policy was involved. Thus, by the compromise before any judgment was obtained, the company relieved itself of $10,000.00 worth of liability for $4,750.00. No injunctive relief was sought by the wife in that case.) The husband sued in a second action with his wife for special damages, loss of services, medical expenses, etc. They obtained a judgment for $6,999.98 and costs of $15.25. The insurance company paid $10,000.00 on the $30,000.00 judgment plus interest and costs. The Court held that the insurance company was liable on the second judgment for only $15.25 costs, pointing out that "one person" in a policy refers to the injured person and "one accident" to injury of several persons, regardless of how many may suffer loss by reason thereof. The husband, who was not injured, could get no recovery from the insurance company, the company having paid the limit of its liability to the wife and the second person injured in the accident. (The question of pro-ration was not discussed.)

Likewise, in *Williams v. Standard Accident Insurance Co. of Detroit,* (5th Cir., La.) (April 11, 1951) the wife brought action individually and as tutrix of her two minor children for the death of the husband and father in an accident. A 5-10 policy worded like the one in the instant case was involved. The question was whether the limit of $5,000.00 to "each person" means the person bodily injured in "each accident" or each person who thereby suffers damages. The wife and children were not involved in the accident. The Court held, approving *Gaines v. Standard Accident Insurance Company* (La. App.), 32 So. 2d 633, that the limit as to "each person" relates to a person suffering bodily injury and not to the person or persons

who may suffer damages in consequence of such injury. Therefore, in that case, the limit of liability of the company was $5,000.00.

In *Employers Liability Assurance Corp.,* 180 La. 406, 156 So. 447, a father obtained judgment for $6,457.00 in medical expense for his daughter who was injured and who obtained a $30,000.00 judgment. A 10-20 policy was involved. The insurance company deposited $10,000.00 in Court and the court held the liability of the company was thereby discharged and that the father could not claim $20,000.00 was the limit of the policy because that limit was for bodily injuries or death of more than one person and that if it were one accident causing bodily injuries or death to more than one person, then the limit of the liability would be increased from $10,000.00 to $20,000.00.

See also *Lumbermen's Mut. Cas. Co. v. Yeroyan,* 5 A. 2d 726 (N. H. 1939). In that case the husband was denied recovery for consequential injuries he suffered by reason of bodily injuries to his wife.

Next, on this question of the measure of liability of the insurance company in this case, the Appellate Court's attention is directed to paragraph 11 of the conditions, page 3 of the policy reading as follows:

> "Action Against Company—Coverage A—No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined* either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy *to the extent of the insurance afforded by this policy.* Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

"Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder." (Emphasis mine.)

In our case, the liability of Towry to pay has definitely and finally been determined at $47,000.00. The "extent of the insurance afforded by this policy" is clearly $20,000.00 inasmuch as two persons obtained judgments, each having suffered bodily injuries. Thus, the measure of the company's liability is $20,000.00 under the clear and unmistakable language of its own policy. It matters not what the other provisions of the policy are so long as that $20,000.00 is applied toward the satisfaction of Towry's obligations.

Thus, in *Olds v. Gen. Acc. Fire, Etc. Corp.,* 67 Cal. App. 2d 812 at 819 in construing similar language in an insurance policy, the Court points out that the person injured and with a judgment suing an insurance company is bringing an action to be reimbursed for damages suffered, the amount thereof having been fixed by final judgment, and is not bringing an action to recover a loss suffered by him under the policy. (Incidentally, the Court in that case also points out that it is elementary that ambiguous provisions of an insurance policy should be construed against the company.) In our case, we are not interested in any of the technical provisions of the policy.

Our action is not *on* the policy but *for* the asset of $20,000.00 that it affords.

Our action is much like that in the case of *McNulty v. Conn. Mut. Life Ins. Co.*, 46 Fed. 305. In that case, an action was brought by an administratrix against the insurance company on a policy of insurance on the life of her intestate, in which one claiming the policy as an assignee was made a party defendant. The Court stated as follows:

> "According to the theory of the action as set forth in the petition filed therein, both the administratrix and Duncan have an interest in the single claim against the insurance company, and it is proposed to settle the liability of the company on the policy, and then, if such liability is established, to determine the shares or interests belonging to the claimants."

2. *Injunctive Relief.* The authorities support Winget's theory that she is entitled to enjoin Standard and Mack from settling Mack's case. It seems clear that Winget, having obtained her judgment in State Court, has a property interest in the $20,000.00 fund entitling her to such injunctive relief.

A note in 49 *Harvard Law Rev.* page 658 points out that most courts refuse equitable relief by way of injunction to *non judgment* claimants attempting to enjoin an insurance company from compromising claims of other claimants. The note states that if the statute prevents the insurance company from canceling the policy it would seem to give the injured party a beneficial interest in the proceeds. (Under condition 11 of the policy in our case, the reduction of the claim to judgment entitles the claim-

ant to sue the insurance company. Thus, there is a direct liability to the claimant and he has a beneficial interest in the fund by the insurance contract itself.) The article seems to favor injunctive relief, pointing out that an insurance company should not have the power to decide which injured party should be paid because they could coerce claimants into unfavorable compromises by threatening to exclude them altogether.

Another article in 11 *N. Y. Univ. Law Quarterly Rev.,* page 447 at 451 concludes that legislation should be enacted in multiple injury cases requiring insurance companies to notify all claimants of any proposed settlement and any claimant could enjoin settlement if he was not satisfied therewith and contend that he claims a disproportionate share of the fund as going to other claimants. The conclusion dealt only with non-judgment holders.

In *Turk v. Goldberg* (N. J. 1920), 109 Atl. 732, a statute provided that a bus owner must have a policy in the sum of $5,000.00 against injuries and it "shall be for the use and benefit of every person suffering loss, damage or injury." A non-holder sought to enjoin payment by the insurance company of further payments on a policy, ($2,800.00 was left unpaid), contending that the money should be paid to the Clerk of Court for distribution to all persons injured. The Court pointed out that every person injured has an inchoate lien on the policy which inchoate right can ripen into an actual lien only by recovery of final judgment against the assured and such liens have priority in the order in which they mature and are presented to the insurance company. In our case, the judgments matured on the same day and at the same time so the liens arose at the same time and in the particular facts of our case, injunctive relief is more than ever in

order. What the rule should be when one judgment is obtained some time after another is immaterial to our case. However, under such situation, if the first judgment holder had done nothing toward the collection of his judgment it would seem that the second could bring the policy of insurance within the jurisdiction of the Court and thereby establish his lien and enjoin any settlement with the first judgment holder and request pro-ration. It would seem that until the policy is actually brought into Court by some affirmative action against the insurance company no lien actually has come into existence.

In *Ward Trucking Corp. v. Philadelphia Nat. Ins. Co.*, 67 A. 2d 480 at 483, the Court held in a suit by plaintiff against the insurance company, where the insurance company asked pro-ration in a counter-claim against plaintiff's claim and several other claimants whose claims had not and were not being pressed, that the insurance company could not pro-rate, pointing out that other claimants might never press their claims. Plaintiff in that case was held entitled to the full limit of the policy for one claimant. The case is authority for the rule that until a judgment is obtained by other claimants, a judgment holder may enforce his claim for the full limit available for one person injured. Likewise, in our case, if Winget were the only judgment holder, the funds available for payment of her judgment would be only the sum of $10,000.00, that being the only liability fixed against the company by a final judgment. It would seem that she, with her judgment, could enjoin a settlement by the insurance company with Mack if he did not hold a judgment, at least to the point where there still remained $10,000.00 liability left on the policy. However, once the liability of the company has been determined by judgments in favor

of Mack and Winget it is the total liability for the single accident, $20,000.00, that has been determined as the funds available for payment and plaintiff Winget, with her judgment, would be entitled to injunctive relief against settling with Mack on that full liability rather than for just $10,000.00 of it.

So far as this appeal is concerned, we are concerned only with what the rule should be where two judgments are obtained at the same time. The foregoing discussion of different situations than ours is presented merely as an aid to the Court in determining the effect on other situations of the rule to be applied in this case.

In *Bruyette v. Sandini, et al.* (Mass. 1935), 197 N. E. 29, the court pointed out that prior to the rendition of a judgment in favor of an injured party, such party had no property right in the insurance fund upon which equity would act to enjoin the insurance company from paying others who were injured in the same accident. However, after rendition of the judgment, the plaintiff had a property right in the insurance fund and therefore equity would intervene to aid the plaintiff in the protection of his property rights against the insurance company. The Court cited *Mathewson v. Colpitts,* 284 Mass. 581, 188 N. E. 601, to the effect that upon recovery of a judgment, the plaintiff had a right in the nature of a lien against the insurance company on the money due under the policy.

In *Pisciotta v. Preston,* 10 N. Y. S. 2d 44 (1938) the plaintiff, without a judgment, sued for himself and others to enjoin payment of judgments already granted in favor of others. The Court held that the plaintiff not having a judgment was not in a position to get injunctive relief, but pointed out that if he had had a judgment he could have obtained such an injunction.

3. *Payment Relieves Company of Liability.* The insurance company may contend that if, in a case like ours, they were required to pay $13,600.00 to one claimant and $6,400.00 to another, then they would still have a claim against them for $3,600.00 from the second claimant. The authorities do not support such a contention.

The insurance company is completely relieved of liability when it pays the full extent of its liability as established by judgment or judgments. The cases seem clear that the company would be so relieved. This is so, even though there has been no pro-ration in paying several claimants.

Thus, in *Bartlett v. Travelers Ins. Co.,* 117 Conn. 147, 167 Atl. 180 (1933), the defendant insurance company was sued on a $10,000.00 judgment on its policy limiting its liability on account of one accident to $10,000.00. The insurance company had theretofore settled with two other claimants in the same accident until there was only $3,-750.00 left available under the policy when the plaintiff obtained his $10,000.00 judgment. The Court held that the insurance company was authorized to compromise and settle multiple claims and the amount of such settlements was deductible from the limited liability in determining the liability to the injured party on the judgment. Applying the facts of that case to the case now before the Court, it is obvious that if Standard had settled out of Court with Mack on his judgment for $8,000.00 or had paid Mack $8,000.00 without getting a full release for its $10,000.00 of liability to him, the most that plaintiff would be entitled to under any theory would be $12,000.00 instead of the $13,617.02 that she is claiming. By injunctive relief we prevent such an irreparable loss to her.

In the *Bartlett* case, the Court pointed out that up to the time when judgment is rendered for him in an action against the assured, a claimant has only an inchoate right against the insurer.

The only case holding an insurance company *may* be liable for more than its limited liability is the rather indecisive rule in Texas (definitely a minority decision on that question alone) established in the case of *Darrah v. Lion Bonding & Surety Co.* (Texas 1918), 200 S. W. 1101. In that case the insurance company paid the full extent of its liability to 3 claimants. A fourth claimant instituted suit after the other three had obtained judgments but before the insurance company had paid the other three. The insurance company then paid the first three claimants before a decision in the case. The Appellate Court held that the insurance was for the benefit of all persons injured in the same accident and, as the amount was insufficient to satisfy all claims, it should be prorated in proportion to the amount of damages sustained by each and that the plaintiff would have been entitled to share in the amount of insurance if he had intervened. The Appellate Court then held that the trial court should have submitted to the jury the question of estoppel because of plaintiff's negligence in not bringing suit in time and reversed the trial court as to the insurance company for a new trial on that issue.

85 *A. L. R.* 39 points out that on a suit against an insurance company, the injured party may recover just what the insured might have recovered if the judgment had been fully satisfied by the insured, that is, not to exceed the limit of the policy. The annotation cites *Strafiotis v. Cal. Highway Indem. Exch.* (1930), 107 Cal. App. 522, 290 Pac. 628, in support of this statement.

See also *Employers Liability Assurance Corp.,* 180 La. 406, 156 So. 447 and *Perkins v. Firemans Fund Indem. Co.,* 44 Cal. App. 2d 427 and *Hyer v. Inter-Ins. Exch.* 77 Cal. App. 343 all holding that upon payment of the full extent of the insurance company's liability on its contract it is relieved of any further liability.

In the case of *O'Donnell, et al v. New Amsterdam Cas. Co.* (R. I. 1929), 146 Atl. 770, several plaintiffs brought action to recover on judgments totaling $55,000.00. A 10-20 policy was involved. Several claims were still pending for trial but these had judgments and had agreed upon a distribution of the proceeds. (The question of priority did not therefore arise. Apparently they had agreed pro-rata as the Court awarded the money "on account of judgment"). The Court held the insurance company was discharged from further liability on paying the full amount of its liability. (The Court also held that the fund was available to those who prosecuted their judgments in accordance with the usual practice respecting judgments. This indicates in our case that diligence on the part of the plaintiff Winget in subjecting the assets of the policy to pay her judgment should entitle her to injunctive relief.)

In *Stotlove v. Fidelity & Cas. Co.,* 157 Misc. 106, 282, N. Y. Supp. 263 (N. Y. 1935), the action was by plaintiff against the insurance company, which had paid the full limit of the policy to one of decedent's representatives, who had first recovered judgment. The policy was a $10,000.00 for one person and $10,000.00 for one accident. The Court held that the company's liability was thereby relieved.

4. *Equitable Principles of Pro-ration.* On the question of pro-ration there is not an abundance of authority but wherever the question was discussed the courts have held that the fund should be pro-rated in accordance with the size of the respective claimant's judgments. It is obvious that the plaintiff Winget was the more seriously injured in the accident and the only basis upon which we determine how much more seriously is the amount of her judgment as compared to the amount of the judgment in favor of Mack.

A case directly in point on the subject is *Century Indem. Co. v. Kofsky, et al.* (Conn. 1932), 161 Atl. 101. In that case there were 4 judgment holders, one with a judgment for $8,886.00 ($2,200.00 of which was property damage, the balance personal injuries), one for $5,000.00 for death, one for $15,000.00 for personal injuries and the fourth for $4,500.00 for personal injuries. The insurance company interpleaded the four judgment holders. The policy was a 5-10 policy. The Court at page 103 stated as follows:

> "Where several creditors are restricted for satisfaction of their claims to a single fund inadequate to pay all, the general rule adopted is that of equality. Examples are claims against insolvent estates of deceased persons and against insolvent debtors, claims in receivership, and rights of sub-contractors under the mechanic's lien law—Whenever several persons are entitled to participate in a common fund, or are all creditors of a common debtor, equity will award a distribution of the fund, or a satisfaction of the claims, in accordance with the maxim, Equality is Equity; in other words, if the fund is not sufficient

to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon equal footing and will decree a pro-rata distribution or payment—Justice requires that they (injured parties) share in equal proportions in the sums due under it (the policy) on account of the particular kind of injuries suffered."

The above case has been traced through Shepards Citator to September of 1951 and is still sound law. In that case, the judgments were procured at different dates and in the different amounts above set forth. The Court would not pro-rate on the basis of the date of acquiring judgment, stating that it would make for a race to litigate first, burdening the courts. In that case the policy was placed before the Court by the insurance company. *The only difference in that case and the one before this Court lies in the fact that the policy has been brought before the Court in this case by plaintiff Winget. Just because Winget seeks the relief instead of the insurance company should make no difference whatsoever.* The equitable, fair and legal thing to do in either case is to make a pro-rata distribution.

At 28 *Ill. Law Rev.* page 576 at 578, concludes that if plural claims are reduced to judgment, the most obvious solution is to compel pro-rata apportionment of the insurance fund.

43 *Yale Law Journal,* 136 at 139 concludes as follows:

"All claims reduced to judgment and all settlements, when their sum exceeded the coverage of the

policy, should be satisfied pro-rata, according to the amounts of the respective settlements or judgments —This procedure of dealing with all claimants as a group should be required even though the insured appears to be solvent and able to pay any judgment above the coverage of the policy."

In *Brill v. Foshay Co.,* 65 Fed. 2d 420 (8 Cir. Minn.) the Court held at 424 that equity will not lend its aid to one whose sole ground for seeking such aid is based upon a technicality, stating that it is axiomatic that in the absence of relations or conditions requiring a different result, equity will treat all members of a class as upon an equal footing and will distribute benefits either equally or in proportion to the several interests, and without preferences.

In *Green v. Bankers Ind. Ins. Co.,* 84 Fed. Supp. 504, affirmed in 181 F. 2d 1, a widow sued individually for her damage because of her husband's death and also as guardian of three children. The judgment was for $15,000.00 against the insurance company on its policy in that amount. (That was the limit.) The Court apportioned the $15,000.00, ½ to the widow and the other ½ among the 3 children in accordance with their ages.

Undoubtedly counsel for defendant Standard will cite cases where no apportionment was made but a careful examination of these cases will readily disclose that apportionment was never raised as an issue and was not even discussed.

Interest Is Due on $32,097.80.

Section 3757 (1) *General Laws of California* provides that the rate of interest upon any judgment rendered in any Court in this State shall be 7% per annum. Thus, Towry is obligated to pay interest on the full amount of the judgment against him in the sum of $32,097.80.

Paragraph II of the insuring agreements, page 2 of the policy reads as follows:

> "Defense, Settlement Supplementary Payments—As respects such insurance as is afforded by the other terms of this policy under coverage A *the company shall*
>
> "(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;
>
> "(b) *pay* all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, *all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon,* and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

"(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

"The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy." (Emphasis mine.)

It seems quite clear after reading just the portion of the paragraph above in italics (which portion is the only part under consideration at this point) that the company has agreed to pay all interest on the judgment against Towry in the sum of $32,097.80 *in addition* to the applicable limits of liability of the policy. If the company had intended that the words "all interest" should refer only to interest on the part of such judgment as shall not exceed the company's liability thereon, it would have said so in the policy. It seems to mean just what it says, namely, the company agrees to pay all interest "incurred" until the company shall pay such part of such judgment as does not exceed its liability. The only person who has "incurred" interest is the assured Towry and he certainly has incurred the interest on the full $32,097.80 from the 30th day of March, 1950.

The words "such part of such judgment" certainly must refer to the principal of the judgment that the company is liable for. This is especially true when we consider that the California statute in effect at the time of the accident, *Section 420, Vehicle Code,* and now in effect, *Section 422.6, Vehicle Code,* both read that liability policies must provide for a limit "exclusive of interest and costs" of not less than $5,000.00.

Paragraph 4 of the conditions, page 3 of the policy, provides that the insurance afforded by the policy shall

comply with the provisions of the Motor Vehicle Financial Responsibility Law of this State, the sections above mentioned being part of that law. Thus, by legislative enactment and the terms of the policy itself, the full limit of the company's liability is pledged for payment on the principal of the judgment and interest is payable over and above that principal payment. Therefore, we conclude that when the company has paid "such part of such judgment as does not exceed its liability" those words refer to the principal sum due under the policy and when that sum has been paid, all interest on the entire judgment ceases.

Counsel for defendant Standard will undoubtedly cite *Sampson v. Century Indem. Co.,* 8 Cal. 2d 476, 109 A. L. R. 1162. The clause before that court for consideration was, so far as this case is concerned, exactly the same as the clause in this case *except* the clause in the *Sampson* case did not contain the last sentence of the clause in our case above quoted. In other words, the words "the company agrees to pay the amounts incurred under this insuring agreement, except settlement of claims and suits, in addition to the applicable limit of liability of this policy" are not contained in the policy before the court in the *Sampson* case. (Incidentally, that case was decided long before the California Financial Responsibility Act was enacted.)

In the *Sampson* case, the court held that the words "all interest" mean all interest on that part of the judgment for which the company is liable and not interest on the entire judgment. The court said "it hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of $10,000.00 intended to make

it liable for interest on any greater amount. Surely we would not be justified in so construing the policy unless it contains language *clearly expressing such an intention.*" (Emphasis mine.)

In the policy now before the court such an intention *is* clearly expressed when the insurance company states that it agrees to pay interest on the judgment "in addition to the applicable limit of liability of this policy." The annotation at the conclusion of the *Sampson* case in 109 A. L. R. points out that it depends upon the language of the policy as to whether interest is payable on the full judgment or on just a portion of the principal the company is liable for.

A case directly in point is *New Jersey Fidelity & Plate Glass Ins. Co. v. Clark,* 33 F. 2d 235. There, the policy provided that the company would pay, irrespective of the limits of liability, all costs taxed against the assured in any legal proceedings defended by the company pursuant to the policy and all interest accruing after entry of judgment in such proceeding. In that case, judgment was recovered for over $50,000.00 with costs. The policy limit was $10,000.00. The court held that the plaintiff was entitled to interest on the full amount of $50,000.00 and costs by reason of the express statement in the policy. At page 236 of that case, the court stated as follows:

> "An examination of different policies brought to this court discloses that they usually contain a provision limiting the right to recover interest to that portion of the judgment which the company has obligated itself to pay; but the policy in suit contains no such limitation, and *we do not feel at liberty to insert such a limitation into the policy so as to make a new contract for the parties.*" (Emphasis mine.)

The court in that case held that the language in that policy was not free from ambiguity, but it was the language of the company and must be construed most strongly against it.

A policy similar to the different policies examined by the court in the New Jersey case and limiting interest to only the principal sum owed by the company was discussed in *Strafiotis v. Highway Indem. Ex.,* 107 Cal. App. 522. There, the policy had a provision that the company would pay interest "upon such part of said judgment as shall not be in excess of the limits of the liability." Obviously, in the face of that express language the court could not award interest on anything but the limit of the company's liability. See also *General Acc. Fire & Life Assur. Corp. v. Clark,* 34 F. 2d 833, where the same express limit was inserted in the policy. Surely defendant Standard, a large corporation writing insurance policies as far west in the United States as is possible, must have known of these decisions and if they had intended to limit their liability for interest to just the principal sum due under their policies they certainly would have said so in the policy. All they would have had to insert would have been the words "interest on such part of such judgment as does not exceed the limit of the company's liability hereunder." This they did not do but instead, agreed to pay all interest incurred *in addition* to the limits of the company's liability.

In the case of *Hobbs v. Employers Liability Assur. Corp.* (La), 188 So. 748 (1939), the provision regarding interest read almost exactly as the one in the case before the court. There the clause read as follows:

> "All interest accruing after entry of judgment until the company has paid, tendered or deposited in

> court such part of such judgment as does not exceed the limit of the company's liability thereon . . . the company agrees to pay the expenses incurred under divisions (a) and (b) of this section *in addition* to the applicable limit of liability of this policy." (Emphasis mine.)

The court then held that the above clause clearly showed interest from date of judgment shall be paid by the insurer "over and above, and in addition to, the limit of its liability on the policy."

Conclusion.

From the foregoing it seems conclusive that the only equitable, fair and reasonable method of allotting the full liability of the company is to require the insurance company to pay into court the sum of $13,617.02 for disbursement to plaintiff Winget and to require also that the insurance company add to that amount interest on the full sum of $32,097.80 at 7% per annum from the 30th day of March, 1950.

Respectfully submitted,

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